

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BURGER KING CORPORATION	:	CIVIL ACTION
	:	
v.	:	
	:	
NEW ENGLAND HOOD AND DUCT	:	NO. 00-1787
CLEANING COMPANY	:	

MEMORANDUM AND ORDER

BECHTLE, J. MARCH , 2001

Presently before the court is defendant New England Hood and Duct Cleaning Company's ("New England") Motion for Summary Judgment and plaintiff Burger King Corporation's ("Burger King") opposition thereto. For the reasons set forth below, the motion will be granted.

I. BACKGROUND

Burger King instituted the instant action on April 5, 2000, seeking to recover attorneys' fees that were incurred in the prosecution of Burger King Corporation v. New England Hood and Duct Cleaning Company, et al., Civil Action No. 98-3610 (the "underlying action"), wherein a jury returned a verdict in Burger King's favor on June 14, 1999.

In the underlying action, Burger King argued, inter alia, that New England breached its contract with Burger King by not timely cleaning Burger King's hood and duct system, thereby causing a fire. In the instant Complaint, Burger King argues that, pursuant to paragraph 15 of the Service Agreement at issue in the underlying action, it is entitled to reasonable attorney's fees and costs incurred in connection with the underlying action.

In its motion for summary judgment, New England argues that Burger King's claim is barred by the doctrine of res judicata.

II. LEGAL STANDARD

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Id. In considering a motion for summary judgment, "[i]nferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992) (citation omitted).

III. DISCUSSION

Res judicata, or claim preclusion, "gives dispositive effect to a prior judgment if a particular issue, although not litigated, could have been raised in the earlier proceeding."

Churchill v. Star Enters., 183 F.3d 184, 194 (3d Cir. 1999) (citing United States v. Athlone Indus., 746 F.2d 977, 984 (3d Cir. 1984)); CoreStates Bank, N.A. v. Huls Am., Inc., 176 F.3d 187, 194 (3d Cir. 1999) (same). Claim preclusion requires a defendant to demonstrate that there has been: (1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action. Churchill, 183 F.3d at 194 (citation omitted).¹

Claim preclusion prohibits reexamination not only of matters that were actually decided in the prior case, but also those that the parties might have, but did not, assert. See id. (stating that "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised") (quoting Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 473 (1998)). Thus, merely because a party did not raise a particular issue in the first judicial proceeding will not enable it to avoid claim preclusion, if those particular claims could have been raised in that first proceeding. Id.

¹ "Federal law determines the effects under the rules of res judicata of a judgment of a federal court." Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1329, 1332-33 (10th Cir. 1988) (citing Restatement (Second) of Judgments (1982), § 87 cmt. b, at 317-18); see also Lubrizol Corp. v Exxon Corp., 929 F.2d 960, 962 (3d Cir. 1991) (noting that majority of appellate courts apply federal law, at least where issues are not "clearly substantive").

A claim against an adverse party for attorneys' fees and costs that were incurred in the prosecution of a substantive claim is part of the same cause of action as that underlying the substantive claim. See, e.g., Driscoll v. Humble Oil & Ref. Co., 60 F.R.D. 230, 234 (S.D.N.Y. 1973), aff'd 493 F.2d 1397 (2d Cir. 1974) (citing A.H. Fox v. Connecticut Fire Ins. Co., 380 F.2d 360, 361 (10th Cir. 1967) & Bankers Life and Cas. Co. v. Kirtley, 338 F.2d 1006, 1011 (8th Cir. 1964)). Thus, it is barred by the doctrine of claim preclusion. Id.

Burger King argues that the court should estop New England's assertion that Burger King's claim is precluded because, in its Answer to the instant Complaint, New England raised several "inconsistent" affirmative defenses. (Pl.'s Mem. of Law in Supp. of Opp'n to Def.'s Mot. for Summ. J. at 2.) Specifically, New England asserted both: (1) that Burger King was not the prevailing party and that consequently, the claim for attorneys' fees was not yet ripe; and (2) that the claim for attorneys' fees was barred by res judicata.

However, the principle of judicial estoppel does not apply here. See Fed. R. Civ. P. 8(e)(2) (stating that "[a] party may set forth two or more statements of a claim or defense alternately or hypothetically . . . [and] [m]ay also state as many separate claims or defenses as the party has regardless of consistency"); see also Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir. 1996) (stating that purpose of judicial estoppel is "to prevent parties from playing fast and

loose with the courts by asserting inconsistent positions" and that "any application of the doctrine must rest upon a finding that the party against whom estoppel is sought asserted a position inconsistent with one she previously asserted in a judicial proceeding"). Thus, the argument that New England should be estopped from asserting that Burger King's claim for attorneys' fees is res judicata is wholly without merit.

IV. CONCLUSION

For the reasons set forth above, New England's motion for summary judgment will be granted.

An appropriate Order follows.

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ORDER

AND NOW, TO WIT, this day of March, 2001, upon consideration of defendant New England Hood and Duct Cleaning Company's Motion for Summary Judgment and plaintiff Burger King Corporation's opposition thereto, IT IS ORDERED that said motion is GRANTED. Judgment is entered in favor of defendant New England Hood and Duct Cleaning Company and against plaintiff Burger King Corporation on all counts.

LOUIS C. BECHTLE, J.